Office-Supreme Court, U.S.
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82-1438

No. 82-____

In the Supreme Court of the United States

October Term, 1982

RICHARD R. WRIGHT, on behalf of himself and all others similarly situated,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

May petitioner, in making a claim of racial discrimination in compensation on behalf of the class of employees he represents in this Title VII action, properly proceed on a "disparate impact" theory, Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977), where the evidence showed black employees to have been disadvantaged in salary in direct relationship to their educational disadvantages and no evidence suggested that such education bore "a manifest relationship to the employment in question"? Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

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No. 82-_____

IN THE SUPREME COURT

of the

UNITED STATES

October, Term 1982

RICHARD R. WRIGHT, on behalf of himself and all others similarly situated,

Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on October 18, 1982, petition for rehearing thereof having been denied November 29, 1982.

Question Presented

May petitioner, in making a claim of racial discrimination in compensation on behalf of the class of employees he represents in this Title VII action, properly proceed on a "disparate impact" theory, Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977), where the evidence showed black employees to have been disadvantaged in salary in direct relationship to their educational disadvantages and no evidence suggested that such education bore "a manifest relationship to the employment in question"? Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

Opinions Below

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit and the Findings, Conclusions and Judgment of the District Court for the Northern District of California, in this case, have not been reported. They are set forth in the Appendix, infra.

Jurisdiction of this Court

The judgment of the Court of Appeals for the Ninth Circuit, herein sought to be reviewed, was rendered on October 18, 1982. A timely Petition for Rehearing was denied by that court on November 29, 1982. Jurisdiction of this Court to grant the writ is conferred by 28 United States Code, Section 1254.

Statute Involved

This case involves Section 703(a) of the Civil Rights Act of 1964:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C., §2000e-2(a).

Statement of the Case

Petitioner, Richard R. Wright, had been an employee

of respondent, International Business Machines Corporation, Inc. ("IBM") from November 20, 1967, until his discharge on December 19, 1975. He served as a Sales Trainee and a Marketing Representative in IBM's Data Processing Division ("DPD") at various offices in the San Francisco Bay Area.

Having satisfied the statutory prerequisites, he commenced this action on March 12, 1976, alleging racial discrimination in employment. Jurisdiction of the district court was premised upon 28 U.S.C., § 1343(4) and 42 U.S.C., § 2000e-5(f)(3). The district court determined, pursuant to Rule 23(c), FRCP, that the action might be maintained as a class action and defined the class to consist of those blacks employed in IBM's DPD offices in Oakland and San Francisco since January 20, 1972. By orders granting summary judgment, the class issues were limited to the claim that blacks were discriminated against with respect to pay. At the conclusion of plaintiff's case, the court granted defendant's motion, under Rule 41(b), FRCP, for dismissal of his claims, other than the class pay claim, and at the conclusion of all of the evidence, made findings for the defendant on the class claims as well. The court of appeals affirmed. This petition seeks review of that court's

affirmance as to the class claim only.

The evidence on the class issue of pay discrimination consisted almost exclusively of the testimony of experts in labor economics and statistics concerning analyses done by them, by "least squares multiple regression", of IBM's relevant payroll data. That data consisted of the payroll information recorded as of the end of each of the calendar years 1971 through 1977 for each of the DPD's Bay Area employees in Salary Levels 11-23 and 51-58. [1]

Plaintiff's expert did a multiple regression analysis which showed a statistically significant black pay disadvantage

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1./ A "salary level" is a pay range to which positions of comparable skill and responsibility are assigned by IBM. The exact pay within each range which each employee earns is a function of several factors, most importantly: previous salary amount, time since last salary change, the employee's rating in the performance evaluation process, the fact of promotion into a higher salary level (if that has occurred) and a degree of managerial discretion as to the timing and amount of earned, or "merit', salary increases. The employees included in the data base for the experts' multiple regression analyses done in this case were (1) technical and clerical employees who were "nonexempt", within the meaning of the overtime pay provisions of the Fair Labor Standards Act (Levels 11-23) and (2) "exempt" sales, systems engineering, and administration employees (Levels 51-58). Omitted were trainees, employees awaiting reassignment, and high management officials. The number of employees in this data base varied from year to year between 545 and 695. Of these, blacks numbered from 42 to 65.

over the seven-year period measured. The analysis done by defendant's expert differed; he found minor differences, but none of statistical significance. However, defendant's expert, Dr. Finis R. Welch, testified that substantially all of the difference between the parties' statistical conclusions were explained by two "pay determinants" which he entered as variables in his regression but which plaintiff's expert omitted. These two factors were (1) an employee's initial placement (whether initially hired as an exempt or as a nonexempt employee) and (2) the level of an employee's educational atainment. He further testified that (1) more than twice the proportion of blacks in the data base lacked college degrees as did whites, (2) most non-college blacks are initially assigned to nonexempt positions, and that (3) 41% of the blacks found in exempt positions came to them from nonexempt ones, while that was true of only 26% of the white exempt employees. Thus, both of the variables he identified as accounting for the racial salary differentials tended to correlate with each other and to establish education as the pay determinant which, on average,

brought about the black salary disadvantage. [2]

For hire into the positions involved in these studies IBM imposed no education requirements, nor do those positions include any duties dependent upon educational attainments.[3] Rather, IBM provides extraordinarily intensive in-house training for exempt positions of the kind found in this data base. In plaintiff's own case, IBM provided him training in sales for 26 months before putting

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2. Testimony did not establish the manner in which education brought about a salary advantage, only the fact that it did. Education is a factor employed in initial salary setting and the explanation might lie in the carry-over effect from that practice. Alternatively, education might correlate with the results of subjective performance evaluations which are a key factor in salary setting after initial hire. See Note 1, supra. (If the latter were true, it would still remain undetermined whether those performance evaluations had validity or whether, as Dr. Welch suggested in explaining his exclusion of them from the variables used in his regressions, they were merely a mask for discrimination.) In any event, though the record does not explain how education determines pay advantage, there is no reason to doubt that defendant understands how. Dr. Welch testified, inter alia, that he did over 100 regression runs on this data base.

3. For a few specialized positions, such as in law, IBM does impose education requirements. But incumbents of such positions were not in the data base, or in the plaintiff's class.

him into the field as an Associate Marketing Representative. Defendant's witnesses testified that IBM has made no attempt to validate education as being job-related so as to warrant the education-dependent pay differentials. Moreover, the record is devoid of evidence warranting even an inference that better educated employees have earned a pay advantage by better performance. In fact, viewing promotions as a measure of performance, the testimony of defendant's expert, Dr. Welch, was to the effect that blacks (in the data base under study) appeared to be equalling, or even outperforming, whites.

Reasons for Granting the Writ

The court of appeals held that the disparate impact analysis of Griggs v. Duke Power Co., 401 U.S. 424 (1971), could not be applied to the facts of this case. We respectfully submit that this holding conflicts with applicable decisions of this Court [4] and of several federal Courts of Appeals. [5]

4. In addition to Griggs, plaintiff believes this conflict exists with Connecticut v. Teal, 102 S.Ct. 2525 (1982) and County of Washington v. Gunther, 452 U.S. 161 (1981).

5. For instance, Grant v. Bethlehem Steel Co. 635 F.2d 1007 (2d Cir. 1980); Williams v. Colorado Springs, Colo. School Dist. 11, 641 F.2d 835 (10th Cir. 1981); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

The Court of Apppeals stated that the "disparate impact model . . . 'applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the work force.'" Memorandum Opinion, Appendix, p. 8a, quoting Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 800 (5th Cir. 1982. [6] This conclusion, amplified as it is by the judicial

6. The court also, at this point, cited Chrisner v. Complete Auto Trans., Inc., 645 F.2d 1251 (6th Cir. 1981) which, at the page cited, said:

> Central to both theories of liability [disparate treatment and disparate impact] . . . is the existence of an identifiable employment practice or policy that demonstrably affects all members of a class in a substantially similar, if not identical manner. 645 F.2d at 1257.

Finally, it cited Taylor v. Teletype Corp., 648 F.2d 1129 (8th Cir. 1981), a disparate treatment case which said, of disparate impact analysis:

> A Griggs-type case challenges facially neutral standards that affect employees in a significantly discriminatory pattern. [Citations omitted.] Here, plaintiffs do not challenge objective criteria; rather, they allege improper use of subjective procedures for demotions. 648 F.2d at 1132-1133, n. 6.

statements on which it relies[7], impermissibley narrows the broad language of Section 703(a)(2), 42 U.S.C., §2000e-2(a)(2), so recently interpreted by this Court in Connecticut v. Teal, ___U.S.___, 102 S.Ct. 2525, (1982). Congress has made it unlawful for an employer:

> (2) to limit, . . . or classify his employees . . . in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . race . . . 42 U.S.C., § 2000e-2(a)(2). (Emphasis supplied.)

Teal insisted on a literal application of that statutory language to a practice which had a disparate impact upon blacks, notwithstanding the existence of an independent employer practice that compensated by affirmatively accepting other blacks for hire in large numbers. The opinion for the Court emphasized the statute's prohibition of "limitations and classifications" that would have the prohibited effect. 102 S.Ct. at 2531. (Emphasis in original.) It held the breadth of its literal interpretation to have been required by "Congress' basis objective in enacting that

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7. See Note 6, above.

statute: 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'" 102 S.Ct. 2532, quoting from Griggs, supra, 401 U.S. at 429-430. It added:

> "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." 102 S.Ct. at 2531, quoting from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

To confine the broad prohibitions of Section 703(a)(2) in the manner done here by the Court of Appeals, or by the dicta from other courts which it cites as justification, [8] Teal holds, is to fail to keep faith with the language and purpose that Congress has adopted.

This Court's opinion in County of Washington v. Gunther, 452 U.S. 161 (1981), moreover, as it explained the

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8. See Note 6, supra.

significance of the Bennett Amendment's having incorporated into Title VII the fourth affirmative defense provided for in the Equal Pay Act, [9] explicitly recognized that disparate impact analysis would, but for that incorporation, apply to claims for discrimination in compensation. Since IBM's compensation practice, 10 has a discriminatory effect based upon race, to which the Bennett Amendment does not apply, it is clearly one which Gunther has described as prohibited because, although "fair in form, [it is] discriminatory in operation." 452 U.S. at 170, quoting from Griggs, supra, 401 U.S. at 431.

Decisions of other federal courts of appeals also are directly in conflict with this decision. The Courts of Appeals for the Second, Fifth and Tenth Circuits have all held that the practice of reposing insufficiently guided

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9. The Bennett Amendment added language to Section 703(h), 42 U.S.C. § 2000e-2(h), that was held in Gunther, to have imported into Title VII's prohibitions on sex discrimination the four affirmative defenses of the Equal Pay Act, 29 U.S.C., § 206(d), when discrimination in compensation is at issue.

10. Described at Note 1, supra.

discretion over personnel decisions in cadres of predominantly white supervisors can be demonstrated (and in these cases was demonstrated) to have a disparate impact upon black employees or applicants subject to that discretion. Grant v. Bethlehm Steel Co., 635 F.2d 1007 (2d Cir. 1980); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Willliams v. Colorado Springs School District, 641 F.2d 835 (10th Cir. 1981). Each involved practices tending to "limit" and "classify" individuals in ways that "would deprive or tend to deprive them of "employment opportunities or otherwise adversely affect" their status as employees. But each accomplished such adverse effect through the indescribably complex and undecipherable funtioning of the human mind engaged in subjective decision-making. Each resulted in a holding of violation because the employer could not justify the process as "manifestly related to the employment in question", and, therefore, rooted in "business necessity".

The decision below conflicts, we submit, because it erroneously rejects as not susceptible to disparate impact analysis a complex salary-setting mechanism that has the effect of penalizing educational disadvantage and, therefore, of injuring black employees. The mechanism is,

we agree, more complex than the high school diploma requirement in Griggs, the testing requirement in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), or the height and weight requirements in Dothard v. Rawlinson, 433 U.S. 321 (1977). But nothing in the language or history of Section 703(a) confines its operation to practices that are merely simple.

The decision below placed mistaken reliance on another decision of the Court of Appeals for the Fifth Circuit, Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (1982). Without turning its back on its earlier decision in Rowe v. General Motors Corp., supra, the Fifth Circuit in Pouncy rejected a disparate impact claim because that plaintiff failed to establish a prima facie case. Plaintiff's proof in Pouncy showed only that blacks in the relevant Prudential workforce, on average, (1) earned fewer dollars than whites, (2) received fewer promotions to managerial positions, (3) earned their promotions only after having served a greater length of time, and (4) were clustered in the lower ranks of the workforce. Plaintiff, in Pouncy, then merely speculated that these effects were the consequence of three practices adhered to by Prudential: (1) job vacancies were not posted, (2) the system of salary levels somehow

(but plaintiff does not explain how) induced the initial hire of blacks at lower levels than whites, and (3) employee performance evaluations involved the use of subjective criteria. But plaintiff's proof made no showing as to what effect, if any, each such practice had upon any of the four disadvantageous consequences he had established. In holding that plaintiff failed to prove a prima facie case, the Fifth Circuit said:

> We require proof that a specific practice results in a discriminatory impact on a class in an employer's workforce in order to allocate fairly the parties' respective burdens of proof at trial . . . Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy. 668 F.2d at 800-801.

By contrast, in the present case defendant's multiple regression analyses have shown precisely what effect education (and its partial surrogate, initial placement) have had on compensation and plaintiff's proof has shown the average dollar amount of that effect. Although plaintiff cannot explain in what way these "pay determinants" have produced the proven effect, defendant is not lacking in the means of attaining that knowledge and has had every opportunity to "respond by offering proof of its legitimacy".

Pouncy does not narrow the generality of Section 703(a)'s prohibitions on practices that "limit" or "classify" so as to discriminate on the basis of race. Only the decision below does. [11]

Many employers have come to appreciate that providing equal employment opportunities serves well the employer's own interest in enhancing productivity and profitability. There is every reason to believe that IBM is such an employer. But the practice at issue in this case, of paying black Americans because of past disadvantage less than whites for discharging the same responsibilities, is not one which any employer has any incentive to change. It is not even in the long range self-correcting. This is just where the law of Title VII, as interpreted by Griggs and its successors, is needed to accomplish the racial justice which Congress sought.

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11. As would the dicta in the two other cases cited by the court below for this holding. See Note 6, supra.

Conclusion

For the reasons stated, petitioner respectfully submits, the writ prayed for should issue.

Respectfully submitted,

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February 25, 1983

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD R. WRIGHT, on behalf of himself and all others similarly situated, Plaintiff, VS. INTERNATIONAL BUSINESS MACHINES CORPORATION, INC., Defendant.	No. C 76-508 SW FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been submitted to the Court, sitting without a jury, and the Court having considered the evidence produced in the entire proceedings in this action, does hereby adopt findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure as follows:

FINDINGS OF FACT

1. Plaintiff, Richard R. Wright, is a black male college graduate who was employed by defendant International Business Machines Corporation ("IBM") in its Data Procesing Division ("DPD") offices in Oakland or San Francisco, California, from November 20, 1967 until his termination on December 19, 1975.

2. IBM, a New York corporation with its principal place of business in New York, is an employer within the meaning of 42 U.S.C. §2000e-(b).

3. Plaintiff submitted three written charges of discrimination to the Equal Employment Oportunities Commission ("EEOC"), the first on September 15, 1972, the second on December 12, 1974, and the third in January, 1976 (after his termination by IBM).

4. Plaintiff duly received Right-to-Sue letters with respect to each charge.

5. In his complaint plaintiff alleges, inter alia, that IBM unlawfully discriminated against him individually in pay, in promotion and in termination, and against blacks as a class in pay and promotion. The Court provisionally certified a class of all blacks allegedly discriminated against in pay and promotion by IBM's DPD offices in Oakland and San Francisco since November 20, 1971 - - a date 300 days prior to the date plaintiff first submitted a complaint of discrimination to the EEOC and 360 days prior to the first date that the charge could have been filed with the EEOC. Subsequently, and pursuant to the decision of the Supreme Court in Mohasco Corp. v. Silver, (1980) ___U.S.___, 100 S.Ct 2486, the class was redefined to include those blacks employed in IBM's DPD offices since January 20, 1972 - - a date 240 days prior to the date of the submission of the charge of the EEOC.

6. On September 25, 1979, the Court granted IBM's motion to decertify from the class, on the promotion issue, all blacks employed in Office and Clerical positions. The Court also granted IBM's motion with respect to the promotion issue as to all other members of the originally certified class. IBM's motion with respect to plaintiff's class-wide pay claims was denied.

7. At the conclusion of plaintiff's case, the Court granted IBM's motion to dismiss plaintiff's individual claims pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. That decision was and is based on the failure of plaintiff to show any racial motivation for defendant's conduct. Conversely, the evidence shows ample justification for plaintiff's dismissal and further indicated plaintiff's treatment by defendant in regard to job assignment and promotion was equal to if not better than other employees of defendant having comparable qualifications and experience. The Court denied IBM's motion to dismiss plaintiff's class-wide claims of pay discrimination, and directed it to present the testimony of a witness familiar with IBM's personnel practices and policies and that of its expert witness as to the alleged adverse impact of IBM's pay system on the class.

8. The majority of DPD employees in Oakland and San Francisco, California, are employed in branch offices in one of three career paths or functions: sales, systems engineering, or

administration. Each branch office is headed by a Branch Manager. The Branch Managers report to the Regional Manger of DPD Region 13, which is headquartered in San Francisco. Prior to January 1, 1974, when Region 13 was formed, the DPD Branch offices in Oakland and San Francisco reported to DPD District 16, which no longer exists.

9. IBM uses the term "exempt" to indicate exemption from the overtime pay requirements of the Fair Labor Standards Act (29 U.S.C. § 201, et seq.) In the DPD, exempt employees include all managers and all persons employed in the sales and in the systems engineering or other professional functions, except trainees. All other employees, i.e., nonmanagement adminstration employees and many trainee positions for sales, systems engineering or other professional jobs are classified as "nonexempt."

10. The placement of a particular position within the hierarchy of increasing levels of responsibility and compensation is designated in IBM by a two-digit number known as a "salary level." The lower salary levels, i.e., levels 11 through 23, are used in IBM to refer to nonexempt positions; the higher levels, i.e., levels 51 and above, are used to refer to exempt positions. Each such salary level refers to a range of dollars within which persons in that salary level are normally paid. Many trainees for sales, systems engineering or other professional positions are assigned

the trainee code "08" or "09" in lieu of salary level. There is no range of dollars associated with trainee codes.

11. Employees in the Oakland/San Francisco DPD offices have entered the same salary level in the same year in different ways, i.e., by promotion into the salary level from a lower salary level or trainee position or by "demotion" into the salary level from a higher salary level for various reasons including performance deficiencies, releveling of positions or career path changes. More often than not, IBM does not decrease the salary of an employee upon "demotion" into a lower salary level. During the relevant period, blacks more often than not were promoted into their observed salary levels whereas nonblacks were disproportionately "demoted" into their observed salary levels.

12. Not all persons hired by IBM into the same position receive the same starting salary. It is IBM's practice to make distinctions in starting salary for persons hired as trainees for sales, systems engineering, or other professional positions based on the educational attainment and prior work experience of the individual trainee hired.

13. The educational atainment of black and nonblack employees in the Oakland/San Francisco DPD offices during the relevant period differs markedly. Fifty-five percent (55%) of the black employees had not obtained a Bachelor's degree whereas

only twent-five percent (25%) of the nonblack employees had to obtained a Bachelor's degree.

14. It takes an employee initially hired as a nonexempt administration employee considerable longer to reach an exempt salary level than it does for an employee initially hired as a nonexempt trainee for an exempt sales, systems engineering, or other professional position. During the relevant period, a higher proportion of black employees than nonblack employees reached exempt salary levels by way of promotion from nonexempt administration positions.

15. Exempt employees experience more rapid salary progress than do nonexempt employees.

16. IBM has had a long-standing policy, in form and substance, to afford equal opportunity and equality of treatment in all aspects of employment without regard to race, color, creed, national origin, age or sex.

17. This policy utilizes a variety of checks and balances to ensure that minority employees - - including blacks - - are not discriminated against. These checks and balances include monitoring of salary equity at the corporate level, the DPD headquarters level, and at the DPD Region 13 level.

18. The policy is fully effective, as a result of which plaintiff has been unable to show any policy, practice or instance

in which a black employee has been the victim of discrimination.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this action under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. §2000e, et seq.) ("Title VII") as to claims of racial discrimination brought by plaintiff on behalf of himself and/or the class which arose on or after January 20, 1972, and under Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. §1981) ("Section 1981") as to claims of racial discrimination brought by plaintiff on behalf of himself and/or the class which arose on or after March 12, 1973.

2. Plaintiff has failed to show by a preponderance of the evidence that IBM discriminated against blacks as a class with respect to pay because of race.

3. Plaintiff has failed to show by a preponderance of the evidence that IBM violated any rights of plaintiff under Title VII or Section 1981.

DATED: February 10, 1981

United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD WRIGHT, on behalf of himself and all others similarly situated,	)	No. 81-4132
Plaintiff-Appellant,	)	DC C76-508SMW
vs.	)	MEMORANDUM
INTERNATIONAL BUSINESS MACHINES CORPORATION, INC.,	)	
Defendant-Appellee.	)	

Argued and Submitted: July 16, 1982

Appeal From The United States District Court
for the Northern District of California
Honorable Spencer M. Williams, Presiding.

Before: WISDOM*, DUNIWAY, and NORRIS, Circuit Judges.

The plaintiff/appellant, Richard R. Wright, filed this class action against his former employer, International Business Machines Corporation ("IBM"), alleging individual and group employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court heard the evidence without a jury, and at the conclusion of

* The Honorable John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

plaintiff's evidence granted IBM's motion to dismiss the individual claim under Rule 41(b), Fed. R. Civ. P. Following a full trial on the class pay discrimination claims, the district court entered judgment for IBM, and filed its Findings of Fact and Conclusions of Law. On appeal, Wright contends that the district court erred in granting IBM's motion to dismiss the individual claims, and in finding that IBM did not discriminate against its black employees in compensation. Because we conclude that these findings were not clearly erroneous, we affirm.

The plaintiff's individual claim of racial discrimination against IBM is based on two incidents of alleged disparate treatment: the company's decision not to promote him to the position of Sales Instructor in 1972; and its decision to terminate his employment in 1975. With respect to IBM's promotion decision, the appellant's claim fails because he was unable to prove a prima facie case of intent to discriminate. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207, 215 (1981); Piva v. Xerox Corp., 654 F.2d 591, 594 (9th Cir. 1981); Golden v. Local 55, Ass'n of Firefighters, 633 F.2d 817, 821 (9th cir. 1980). The disputed position went to a black; racial discrimination played no part in

the decision not to promote Wright. See Jefferies v. Harris Cty. Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980). And IBM did not yet know that the appellant had filed charges with he EEOC (even if he had filed them at the time he was denied a promotion, which is unclear), so retalilation is impossible.

The plaintiff's individual claim based on IBM's decision to terminate his employment in 1975 is also without merit. According to the court's Findings of Fact, "the evidence showed ample justification for plaintiff's dismissal." (Finding of Fact #7). Here the defendant demonstrated that the plaintiff was fired because he falsified his time cards. The Supreme Court in Burdine requires only that the employer articulate some legitimate, nondiscriminatory reasons for its employment decisions. The burden of persuasion then shifts back to the plaintiff to show that these reasons were not the true reasons, "but were a pretext for discrimination". Burdine, 450 U.S. at 253. The district court concluded that Wright did not shoulder this burden before resting, and therefore there was no need to hear the defendant's evidence. See Sime v. Trustees of Cal. State University and Colleges, 526 F.2d 1112, 1113-1114 (9th Cir. 1975). A trial court's conclusions regarding the success or failure of a Title

VII litigant in meeting his burden of proof is reviewed under the clearly erroneous test. Piva v. Xerox Corp., 654 F.2d 591, 594 (9th Cir. 1981). The same rule applies with respect to factual findings. Shah v. Mt. Zion Hospital and Med. Ctr., 642 F.2d 268, 271 (9th Cir. 1981). In view of the specific and legitimate justifications offered by IBM for its treatment of Wright, and in view of his inability to demonstrate that these reasons were pretextual, we hold that the district court's decision to grant the 41(b) motion was not clearly erroneous.

Wright's second contention on appeal is that the district court erred in finding that the defendant did not discriminate against its black employees in compensation. We disagree. The plaintiff attempts to characterize this case as one of "disproportionate impact" in which a facially neutral test, qualification, or standard has a discriminatory effect, and the employer is required to justify it with a legitimate business purpose. See Griggs v. Duke Power Co., 401 U.S. 424, 430-31, 91 S.Ct. 849, 853, 28 L.Ed.2d 158, 163-64 (1971); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349-50, 97 S.Ct. 1843, 1861-62, 52 L.Ed.2d 396, 423 (1977). Relying primarily on the defendant's evidence that salaries correlated with education and initial placement in the company, he argues

that IBM's "policy" of paying higher salaries based on education disfavors blacks. The disparate impact model, however, "applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the work force." Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 800 (5th Cir. 1982). See also Chrisner v. Complete Auto Trans., Inc., 645 F.2d 1251, 1257 (6th Cir. 1981). Taylor v. Teletype Corp., 648 F.2d 1129 (8th Cir. 1981). At most, Wright was able to show a correlation between education and salary, not a causal link atributable to IBM's practices or policies. Because IBM instituted no specific procedures, practice or test, the plaintiff's claim is properly one of disparate treatment, rather than disparate impact. In a treatment case, unlike an impact case, it is necessary to prove an employer's intent to discriminate. Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981). The district court's finding that the appellant failed to show by a preponderance of the evidence that IBM discriminated against blacks with respect to pay is not clearly erroneous.

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD WRIGHT, on behalf of himself and all others similarly situated,	)	No. 81-4132
Plaintiff-Appellant,	)	DC C76-508SMW
vs.	)	ORDER
INTERNATIONAL BUSINESS MACHINES CORPORATION, INC.,	)	
Defendant-Appellee.	)	

Before: WISDOM*, DUNIWAY and NORRIS, Circuit Judges.

Upon due consideration, Appellant's Petition for Rehearing is denied.

* The Honorable John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Office-Supreme Court, U.S.
FILED
MAR 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1438

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD R. WRIGHT, on behalf of himself and all others similarly situated,
Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Is the ruling below—that a Title VII plaintiff relying on a "disparate impact" theory must show the existence of an employer's specific procedure which has a racially disproportionate impact—consistent with the decisions of this Court and the Courts of Appeals?[1]

2. Where petitioner's position at trial was that education "made no significant contribution" to salary levels, and where petitioner's expert witness testified to the same effect, may petitioner now rely upon an alleged correlation between education and salaries?

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[1] The parties are set forth in the title; a list of respondent's subsidiaries and affiliates is contained in Appendix A hereto.

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STATEMENT OF THE CASE

Petitioner's statement of the facts contains many assertions not supported by, or contrary to, the record. The relevant facts, most of which are summarized in the opinions of the district court and the Court of Appeals, are as follows:

Petitioner, a former employee of respondent International Business Machines Corporation ("IBM"), instituted a class action in the district alleging individual and group employment discrimination in violation of Title VII of the Civil Rights Act of

1964, as amended, 42 U.S.C. § 2000e, et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Pet.Appx., p. 8a). Petitioner alleged, among other things, that IBM unlawfully discriminated against blacks as a class in pay (Pet. Appx., p. 2a).[2]

Following the trial, the district court entered judgment for IBM (Pet.Appx., p. 9a). It found that petitioner was "unable to show any policy, practice or instance in which a black employee has been the victim of discrimination" (Pet.Appx., pp. 6a-7a).

It was petitioner's position during trial that "education made no significant contribution" to salary levels at IBM (Reporter's Transcript, p. 1076 (N.D.Cal.)), and petitioner's expert witness testified that including education as a variable in his statistical studies made "no significant change in the results" (Reporter's Transcript, p. 1076 (N.D. Cal.); see also p. 1203).

The Court of Appeals affirmed (Pet.Appx., pp. 8a-12a), holding that a disparate impact theory under Title VII would apply only when an employer has instituted a specific procedure that has a discriminatory effect (Pet.Appx., p. 12a). In rejecting petitioner's argument that IBM had a "policy" of paying higher salaries based on education, the Court of Appeals stated:

> "*At most*, [petitioner] was able to show a correlation between education and salary, not a causal link attributable to IBM's practices or policies. Because IBM instituted no specific procedures, practices or test, the plaintiff's claim is properly one of disparate treatment, rather than disparate impact" (Pet.Appx., p. 12a; emphasis added).

[2] The complaint also alleged discrimination against petitioner individually in pay, in promotion and in termination, and against blacks as a class in promotion (Pet.Appx., p. 2a). The class promotion claims were resolved prior to trial (Pet.Appx., p. 3a); petitioner's individual claims were dismissed at trial pursuant to Rule 41(b) of the Federal Rules of Civil Procedure (Pet.Appx., p. 3a). Petitioner has not attacked these determinations in his petition.

The Court of Appeals held that the district court's finding that petitioner failed to show discrimination by IBM against blacks was not clearly erroneous (Pet.Appx., p. 12a). On November 29, 1982, the Court of Appeals denied a petition for rehearing (Pet.Appx., p. 13a).

ARGUMENT

The crux of petitioner's position, before both this Court and the Court of Appeals, is the erroneous assertion that "black employees * * * have been disadvantaged in salary in direct relationship to their educational disadvantages" (Pet., p. 2). But petitioner's attorney conceded at trial that "the fact of the matter is that education made *no significant contribution*" (Reporter's Transcript., p. 1076 (N.D. Cal.); emphasis added).

Moreover, petitioner's argument to this Court is based on the erroneous assertion that the Court of Appeals misinterpreted *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424 in holding that a plaintiff relying on a "disparate impact" theory must show the existence of an employer's specific procedure which has a racially disproportionate impact. The decision below was entirely consistent with this Court's decisions in *Griggs* and subsequent cases: those cases make clear that a plaintiff must show that an employer's "facially neutral standards" result in a discriminatory pattern, that is, that an employer's "employment standards are discriminatory in effect" (*Dothard* v. *Rawlinson* (1977) 433 U.S. 321, 329).

Contrary to petitioner's erroneous assertion, the Court of Appeals did not "rejec[t] as not susceptible to disparate impact analysis a complex salary-setting mechanism" (Pet., p. 13). In any event, the Court of Appeals properly held that the district court's finding on this issue—that IBM's salary-setting procedure did not discriminate against blacks—was not clearly erroneous.

I. THE RULING BELOW—THAT A TITLE VII PLAINTIFF RELYING ON A "DISPARATE IMPACT" THEORY MUST SHOW THE EXISTENCE OF AN EMPLOYER'S SPECIFIC PROCEDURE WHICH HAS A RACIALLY DISPROPORTIONATE IMPACT—IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

In rejecting petitioner's argument that evidence showing a correlation between education and salaries constitutes a prima facie showing of "disparate impact," the Court of Appeals held "[b]ecause IBM instituted no specific procedures, practice or test [relating to education], the plaintiff's claim is properly one of disparate treatment" (Pet.Appx., p. 12a). The record demonstrates that there was no causal link between education and salary attributable to IBM's practices or policies; IBM had no policy of using education as a factor in setting salaries for existing IBM employees (Pet.Appx., p. 12a).[3]

It is settled by *Griggs* v. *Duke Power Co.*, (1971) 401 U.S. 424 and subsequent decisions of this Court that, as the court below held, the disparate impact model applies only when an employer has instituted a specific procedure with a discriminatory effect:

> "[*P*]*ractices, procedures, or tests* neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices" (*Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, 430; emphasis added).

Petitioner erroneously asserts that "the practice at issue in this case [is] of paying black Americans because of past disadvantage less than whites for discharging the same responsibilities" (Pet., p. 16). The record is to the contrary (see Def.Exhs. 315-N, 316-B, 315-E, 317-A, 315-C (N.D. Cal.)).

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[3] Petitioner's claim did not involve IBM's policies in setting starting salaries (Appellant's Reply Br. (9 Cir.), p. 6, n. 8).

Petitioner acknowledges that the testimony and studies of IBM's expert witness at trial, whom the district court credited, found no statistically significant differences between the salaries of similarly situated white and black employees (Pet., p. 6).

There is no basis for petitioner's contention (Pet., p. 15) that a prima facie showing of disparate impact was made based upon multiple regression analyses indicating that education had an "effect" on salaries (Pet., p. 15). The record does not even show the existence of a statistically significant correlation between education and salary for similarly situated white and black employees (see supra, pp. 2, 3). As the Court of Appeals pointed out, *at most* those regressions showed a correlation between education and salary, not that IBM considers education in its salary decisions (Pet.Appx., p. 12a), and nothing in the record suggests that employees with higher education tend to earn more that those without *because of any IBM practice or policy*.

Petitioner's reliance upon the holding in *Connecticut* v. *Teal* (1982) ___ U.S. ___, 102 S.Ct. 2525 that a "bottom line" defense would not preclude a Title VII plaintiff from establishing a prima facie case (Pet., pp. 10-11) misses the point: the Court of Appeals ruled only that plaintiff failed to establish a prima facie case by identifying an IBM procedure with a discriminatory impact; nothing below speaks to the *Teal* issue of whether an employer who uses a written examination with a discriminatory impact may assert a "bottom line" defense (Pet.Appx., p. 12a).

II. THE COURT OF APPEALS DID NOT RULE THAT A COMPLEX SALARY-SETTING PROCEDURE WAS IMMUNE FROM "DISPARATE IMPACT" ANALYSIS. IN ANY EVENT, THE DISTRICT COURT PROPERLY FOUND THAT RESPONDENT'S SALARY-SETTING PROCEDURE DID NOT DISCRIMINATE AGAINST BLACKS.

Petitioner erroneously asserts that the decision below conflicts with decisions of the Courts of Appeals because it "rejects as not susceptible to disparate impact analysis a complex salary-setting mechanism" (Pet., p. 13). Contrary to petitioner's assertion, the decision below made no mention of a complex salary-setting mechanism (see Pet. Appx., pp. 11a-12a). Thus, petitioner's argument that certiorari should be granted to resolve the alleged conflict between the decision below and decisions applying a disparate impact analysis to subjective, discretionary personnel procedures (Pet., pp. 12-13) is irrelevant.[4]

In any event, the district court properly found that IBM's salary-setting procedures did not have any discriminatory effect upon blacks. The district court found that petitioner was "unable to show any policy, practice or instance" of discrimination (Pet. Appx., pp. 6a-7a), and the Court of Appeals held that this finding was not clearly erroneous (Pet.Appx., p. 12a). The record simply does not show that "IBM's compensation practice * * * has a discriminatory effect" (Pet., p. 12); there are no statistically significant differences between the salaries of similarly situated white and black employees at IBM (supra, p. 4).

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[4] Moreover, IBM has a system of guidelines which determine raises by the performance rating of the employee; a comprehensive review system ensures that performance of employees is evaluated consistently and fairly (Def.Exh. 278-A; Reporter's Transcript, pp. 1388, 1398-1402 (N.D. Cal.)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

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APPENDIX A

List of Parent Companies, Subsidiaries and Affiliates

Respondent International Business Machines Corporation has no parent company and numerous wholly-owned subsidiaries. Minor percentages of the stock of some of its other subsidiaries are held by other shareholders. Those subsidiaries are: International Business Machines of Belgium S.A.; IBM European Office (Brussels) S.A.; Compagnie IBM France, S.A.; Cie, IBM Madagasikara, S.A.; IBM Europe, SA.; IBM Southern Area Development, S.A.; IBM Trade Development, S.A.; IBM Ireland Limited; IBM Israel Ltd.; IBM Italia, S.p.A.; Companhia IBM Portuguesa, S.A.R.L.; IBM Argentina, S.A.; IBM do Brasil-Industria, Maquinas e Servicos Ltda.; IBM de Costa Rica, S.A.; IBM de Honduras, S.A.; IBM de Mexico, S.A.; IBM de Panama, S.A.; IBM Philippines, Incorporated; IBM Thailand Company Limited; and IBM de Exportacion y Servicios, S.A.

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FILED
APR 20 1983
ALEXANDER L. STEVAS,
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No. 82-1438

IN THE SUPREME COURT
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UNITED STATES

October Term, 1982

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vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER

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No. 82-1438

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On Petition for a Writ of Certiorari to

the United States Court of

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REPLY BRIEF ON BEHALF OF PETITIONER

As permitted by Rule 22.5, Supreme Court Rules, petitioner files this Reply Brief to address matters first

raised in respondent's Brief in Opposition.

Respondent claims that "[p]etitioner's statement of the facts contains many assertions not supported by, or contrary to, the record." (Resp. Br., p. 1). For this claim, however, respondent makes only two showings:

1. An interchange between petitioner's expert, petitioner's counsel, and the court at page 1076 and a hearsay statment at page 1203, of the Reporter's Transcript (Resp. Br. pp. 2 and 3); and

2. A conclusion drawn by the Court of Appeals characterizing the relationship between education and salary shown by respondent's statistics otherwise than as petitioner has characterized it and otherwise than as respondent's expert has done so. (Resp. Br. p. 2, quoting the Court of Appeals' decision at Pet. Appx., p. 12a).

I

CONTRARY TO THE STATEMENTS ON BEHALF OF PETITIONER, ON WHICH RESPONDENT RELIES, ITS OWN ELABORATE PROOF ESTABLISHES A DIRECT AND STATISTICALLY SIGNIFICANT CAUSAL RELATIONSHIP BETWEEN EDUCATIONAL DISADVANTAGE AND PAY DISADVANTAGE IN THE EMPLOYEE POPULATION AT ISSUE.

It is true that the statements respondent quotes were made at page 1076 of the Reporter's Transcript by petitioner's counsel, Mr. Moore, and his labor economist, Dr. Vencill. A similar statement was made at page 1203 by petitioner's statistician, Dr. Sperlich. A copy of these two pages of the transcript is set forth in Appendix A to this Brief.

However, no one of these statements purports to have been made as of the speaker's own knowledge. Each is a representation of what the speaker believed to have been another witness' conclusion drawn from a regression run done by the latter. Yet that other witness, Dr. Christopher Achen, later called as a rebuttal witness, was never asked this question.

By contrast, respondent's expert testified to a number

of regression runs he himself had done and to the conclusions he drew from them as to the role education played as a "pay determinant" in the common data base. (Reporter's Transcript, pp. 1464-67). He introduced Defendant's Exhibit 315-B to reflect the results of his principle regression analysis and it shows, consistently for each of the years 1972 through 1977, an increasingly large salary disadvantage associated with decreasing degrees of educational attainment. For each of these showings, the probability statistics are such as to reduce nearly to zero the possibility that these results could have been reached by chance.

In further studies to which respondent's expert testified, moreover, he reproduced the study done by petitioner's expert (showing race-based salary differences) and testified that he could explain essentially all of petitioner's findings by the addition of the factors of education and its partial surrogate, initial placement, as "pay determinants". (Reporter's Transcript, pp. 1481, 1490-92). Respondent's evidence left no room for doubt as to the statistically significant correlation between education and

pay. That evidence also established the correlation between educational disadvantage and race. See the District Court's Findings of Fact, Nos. 11015. (Pet. Appx. pp. 5s, 6a).

II.

THE COURT OF APPEALS' STATEMENT PURPORTING TO DISTINGUISH CORRELATION FROM CAUSATION, IN CHARACTERIZING THE EFFECT OF THIS STATISTICAL SHOWING IS CONTRARY TO THE TESTIMONY OF RESPONDENT'S EXPERT.

Respondent relies on the Court of Appeals' statement that, "[a] t most, [petitioner] was able to show a correlation between education and salary, not a causal link attributable to IBM's practices or policies." (Resp. Br. p. 2, quoting Pet. Appx., p. 12a). But both petitioner's and respondent's statistical experts testified here that their use of multiple regression analyses was for the purpose of moving beyond the description of simple correlations to the point of examining "the impact . . . of various factors" on the dependent variable, in this case salary, to "inspect their effects simultaneously." (Dr. Peter Sperlich, tesstifying at Reporter's Transcript, p. 1146). Respondent's expert, Dr. Welch, spoke of adding factors to increase "the efficiency

with which we measure some of the effects that we are adjusting for race differences." (Reporter's Transcript, p. 1453). He identified these factors as "determinants of salary", and "pay determinants". (Reporter's Transcript, p. 1154). It is, of course, true that a single correlation between two variables may be explained as either cause, or effect, or two concurrent effects of an independent cause or even as having occurred by chance. But the point of multiple regression analyses, such as both petitioner's and respondent's experts have done here, is as completely to include all significant, potential causes of the final outcome into the equation as to be able to explain the weight which any one of them has in influencing the outcome.

It is true that "the reliability of regression results as a basis for descriptive and causal inference can be no greater than the validity of the regression model which produced them." [1] But the regression model upon which petitioner

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1/. D. Baldus and J. Cole, Statistical Proof of Discrimination, (1980), § 8.021, p. 244.

here relies was produced by respondent's expert, for respondent's purposes, in order to prove precisely that role which education played in determining salary that petitioner now claims for it.

CONCLUSION

Petitioner has not misstated the facts which are discernible from the record. The petitioner should be granted for the reasons set forth in its statement of reasons. (Pet. pp. 8-17).

Respectfully submitted,

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April 15, 1983

[Page 1076]

FINAL REGRESSION THAT WE ARE USING.

THE COURT: IS WAS NOT OR WAS?

THE WITNESS: BUT WE DID RUN THOSE VARIABLES, AND THE STATISTICIAN COULD TESTIFY ON THE RESULTS WE FOUND.

THE COURT: BUT WAS IT OR WAS IT NOT INCLUDED IN YOUR INITIAL ONE?

THE WITNESS: WE HAVE — I PROBABLY SHOULD MAKE IT COMPLETELY CLEAR. WE DO HAVE THE EQUATIONS. BUT I BELIEVE THAT THE EQUATIONS WE FINALLY AGREED WERE THE BEST EQUATIONS WERE THE ONES THAT DID NOT INCLUDE THE EDUCATIONAL VARIABLES.

THE COURT: I MISUNDERSTOOD.

THE WITNESS: YES.

MR. MOORE: YOUR HONOR, THE FACT OF THE MATTER IS THAT EDUCATION MADE NO SIGNIFICANT CONTRIBUTION.

MR. WALSH: IF YOUR HONOR PLEASE, I DON'T

KNOW THAT MR. MOORE SHOULD TESTIFY.

THE COURT: HE HASN'T GOT THAT YET.

ASK HIM.

DID IT -- WHEN YOU RAN WITH OR WITHOUT, DID YOU FIND ANY SERIOUS DIFFERENCE BETWEEN THE RESULTS?

THE WITNESS: NO. THERE WAS NO SIGNIFICANT CHANGE IN THE RESULTS.

MR. MOORE: Q DR. VINCELL, DID YOU PLACE AN ORDER OR AN INSTRUCTION TO CONDUCT AN APPROPRIATE MULTIPLE REGRESSION ANALYSIS IN THIS CASE?

[Page 1203]

A DR. ACHEN REPORTER TO ME THAT INCLUDING EDUCATION IN THE REGRESSION MADE ESSENTIALLY NO DIFFERENCE ON ANY OF THE INDICATORS.

THE COURT: AND DID THAT HAVE ANY EFFECT ON THE OPINION WHICH YOU GAVE THIS COURT AS FAR AS YOUR OWN STUDY WAS CONCERNED?

THE WITNESS: NO. MY OWN CONCLUSIONS ARE BASED STRICTLY ON THE EVIDENCE THAT I USED.

THE COURT: OKAY.

MR. MOORE: Q NOW, DR. SPERLICH, YOU KNOW WHETHER OR NOT THERE WERE ANY -- STRIKE THAT.

YOU WERE ASKED QUESTIONS ABOUT WHETHER OR NOT REGRESSION RUNS WERE MADE WITH RESPECT TO SALARY LEVELS. IS THAT CORRECT?

A THAT IS RIGHT.

Q DO YOU HAVE ANY KNOWLEDGE AS TO WHY REGRESSION RUNS WERE NOT MADE WITH RESPECT TO EACH SALARY LEVEL?

A AS I UNDERSTAND IT, BECAUSE THE NUMBER OF CASES IN EACH --

MR. WALSH: THE SAME OBJECTION, YOUR HONOR, ON THE GROUNDS IT'S HEARSAY.

MR. MOORE: Q DID YOU AGAIN HAVE --

THE COURT: WELL THE THING -- HEARSAY IS ADMISSIBLE. I MEAN AN EXPERT WITNESS CAN RELY ON HEARSAY IN FORMING HIS OPINION THAT HE GIVES IN COURT. BUT YOU CAN'T HAVE A